

WILLIAM C. FAIRLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: _____
INGALLS SHIPBUILDING,	)	
INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and the Supplemental Decision and Order Awarding Attorney Fees of A. A. Simpson, Jr., Administrative Law Judge, United States Department of Labor.

Rebecca J. Ainsworth and John F. Dillon (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for employer.

Before: STAGE, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order and the Supplemental Decision and Order Awarding Attorney Fees (88-LHC-3342) of Administrative Law Judge A. A. Simpson, Jr. on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *Muscella v. Sun Shipbuilding & Dry Dock, Inc.*, 12 BRBS 272 (1980).

Claimant was exposed to workplace noise at employer's facility in the course of his employment. Jt. Ex. 1. He underwent an audiometric examination on December 2, 1986, the results of which revealed a zero percent impairment in his right ear and a 15 percent impairment in his left ear. Cl. Ex. 19. Under the American Medical Association *Guides to the Evaluation of Permanent Impairment*, this converts to a binaural impairment of 2.5 percent. *Id.* On July 10, 1987, he underwent further testing, the results of which revealed a zero percent impairment in his right ear and a 13.1 percent impairment in his left ear, which converts to a 2.1 percent binaural impairment. Cl. Ex. 2. Claimant filed a claim for his hearing loss.

A hearing was held, wherein the parties disputed, *inter alia*, the extent of claimant's disability. Decision and Order at 1. The administrative law judge averaged the results of the two audiograms and concluded that claimant sustained a 2.34 percent binaural impairment and is entitled to benefits pursuant to Section 8(c)(13)(B) of the Act, 33 U.S.C. §908(c)(13)(B) (1988). *Id.* at 1, 3. Claimant appeals the decision. Employer has not responded.

Subsequent to the issuance of the administrative law judge's Decision and Order, claimant filed a petition for an attorney's fee. He requested 18.88 hours at a rate of \$125 per hour, totalling \$2,373.75, plus \$13.75 in costs. Employer filed objections, and claimant replied. The administrative law judge reduced the hourly rate from \$125 to \$100 for work performed by attorney Lomax. For attorneys Ainsworth and Dillon, he reduced the hourly rate to \$80 for work performed in 1989, \$85 for work performed in 1990, and \$95 for work performed in 1991. Supp. Decision and Order at 4. The administrative law judge disallowed the time requested for work performed on August 31, 1988, September 17 and September 18, 1990, and reduced the time allowed for work performed on April 4, November 14, and November 15, 1989. Consequently, he awarded a total fee to claimant of \$898.75 plus \$13.75 in costs. *Id.* Claimant appeals the reduction of the requested fee, and employer responds, urging affirmance.

Initially, claimant contends the administrative law judge erred in determining the extent of claimant's hearing loss. He argues that, as he sustained a zero percent impairment in his right ear and a measurable impairment in his left ear, his compensation should be calculated on a monaural basis pursuant to Section 8(c)(13)(A) of the Act. 33 U.S.C. §908(c)(13)(A) (1988). We reject claimant's argument and affirm the administrative law judge's award of disability benefits for a 2.34 percent binaural impairment pursuant to Section 8(c)(13)(B) for the reasons stated in *Tanner v. Ingalls Shipbuilding, Inc.*, 26 BRBS 43 (1992) (*en banc*) (Smith and Dolder, J.J., dissenting).

Claimant next contends the administrative law judge erred in reducing the attorney's fee and specifically in disallowing three hours for work performed on August 31, 1988. Claimant contends the administrative law judge abused his discretion in disallowing the time based on an affidavit supplied by employer to the effect that claimant's attorney previously had billed employer for 27.5 hours on the day in question. Claimant asserts an inability to challenge the accuracy of the affidavit because the prior attorney's fee petitions are not identified and because there is no way to determine the amounts awarded therefor or whether the use of a minimum billing method may have affected the total hours requested on a certain day. He asks the Board to modify the award and allow the

three hours, or in the alternative, award the reduced time the administrative law judge stated he would have granted if the affidavit had not been presented. We reject claimant's contentions.

For the date in question, claimant requested three hours to prepare and file discovery documents. Employer objected to this request, arguing that the information sought was unnecessary for the instant action. Additionally, employer attached the sworn affidavit of Barbrea Darsey, an employee of F.A. Richard & Associates, the administrator of employer's Longshore and Harbor Workers' Compensation program, to show that prior to the petition at issue in this case claimant's counsel had billed employer 27.5 hours for work performed on August 31, 1988 in connection with other cases.<sup>1</sup> Objections at 1-4, Ex. A. The administrative law judge found:

With respect to the times claimed by Mr. Lomax, I am disallowing the three 1 hour items claimed on August 31, 1988 in view of the uncontroverted affidavit attached to Employer's objection which indicates that Mr. Lomax has already billed for 27 1/2 hours on that date in connection with other cases. Had I allowed any time for those three items, I would have reduced same to 1/4 hour each in view of the repetitious nature of the pleadings involved. These same motions and notices have been filed in scores of other hearing loss cases.

Supp. Decision and Order at 4. Thus, in addition to the affidavit, the administrative law judge also cited the repetitious nature of the discovery documents as a reason for disallowing the three one-hour items on August 31, 1988. We conclude that the administrative law judge's reliance on the affidavit does not constitute an abuse of discretion, and his explanation for disallowing the three hours on that day is rational. Therefore, we affirm the awarded attorney's fee. *See generally Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella*, 12 BRBS at 272.

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<sup>1</sup>The affidavit states that the affiant has personal knowledge of the itemized fee petitions in question and that such petitions are in the files of F.A. Richard and Associates.

Accordingly, the Decision and Order and the Supplemental Decision and Order of the administrative law judge are affirmed.

SO ORDERED.

BETTY J. STAGE, Chief  
Administrative Appeals Judge

JAMES F. BROWN  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge